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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JAY G. KIMPEL,
12 CDCR #V-01627,

13 Plaintiff,

16 vs.

19 I. MARQUEZ; D. MARTINEZ;
20 A. BUENROSTRO; RICO; RINK,

23 Defendants.
24
25

Civil No. 11-1084 JLS (POR)

ORDER:

(1) **GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS, IMPOSING
NO INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[ECF No. 2];**

(2) **DENYING MOTION FOR LEGAL
ACCESS TO LAW LIBRARY AND
MOTION TO APPOINT COUNSEL
WITHOUT PREJUDICE
[ECF Nos. 4, 5]; and**

(3) **DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF COMPLAINT
PURSUANT TO FED.R.CIV.P. 4(c)(3)
& 28 U.S.C. § 1915(d)**

26 Jay G. Kimpel, ("Plaintiff"), a state prisoner currently incarcerated at the Richard J.
27 Donovan Correctional Facility located in San Diego, California, and proceeding in pro se, has
28 filed this civil rights Complaint pursuant to 42 U.S.C. § 1983.

1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he
 2 has filed a certified copy of his inmate trust account statement which the Court liberally
 3 construes as a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)
 4 [ECF No. 2]. In addition, Plaintiff has filed a “Motion for Legal Access to Law Library at RJD
 5 State Prison.” [ECF No. 4].

I.

MOTION TO PROCEED IFP

8 All parties instituting any civil action, suit or proceeding in a district court of the United
 9 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 10 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
 11 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 12 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
 13 remains obligated to pay the entire fee in installments, regardless of whether his action is
 14 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
 15 (9th Cir. 2002).

16 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
 17 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
 18 statement (or institutional equivalent) for the prisoner for the six-month period immediately
 19 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
 20 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
 21 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
 22 (b) the average monthly balance in the account for the past six months, whichever is greater,
 23 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
 24 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
 25 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
 26 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
 27 § 1915(b)(2).

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1 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
 2 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CivLR 3.2. *Andrews*, 398 F.3d at 1119.
 3 Plaintiff's trust account statement shows he has insufficient funds with which to pay any initial
 4 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be
 5 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
 6 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing
 7 fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"
 8 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack
 9 of funds available.").

10 Therefore, the Court GRANTS Plaintiff's Motion to Proceed IFP [ECF No. 2], and
 11 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
 12 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court
 13 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

14 II.

15 MOTION FOR ORDER FOR LEGAL ACCESS TO LAW LIBRARY

16 In this Motion, which is far from clear, Plaintiff is requesting that this Court issue an
 17 Order for "full use of legal information in the prison's law library." (Pl.'s Mot. at 1.) It is
 18 simply not clear to the Court what Plaintiff is referring to when he requests "full use of legal
 19 information." It is also not clear whether Plaintiff has some access to the law library or whether
 20 he is requesting unlimited access to the prison's law library. Regardless, there are no current
 21 pending deadlines in this case and thus, law library access is not required at this stage of the
 22 proceedings. Accordingly, Plaintiff's Motion for Legal Access to Law Library is **DENIED**
 23 without prejudice.

24 III.

25 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

26 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 27 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
 28 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or

conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Hebbe v. Pliler*, __ F.3d __, 2010 WL 4673711 at *3 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” *Id.*

As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

1 **IV.**

2 **MOTION FOR APPOINTMENT OF COUNSEL [ECF No. 5]**

3 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil
4 action. The Constitution provides no right to appointment of counsel in a civil case, however,
5 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v.*
6 *Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),
7 district courts are granted discretion to appoint counsel for indigent persons. This discretion may
8 be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017
9 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the
10 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se
11 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and
12 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,
13 789 F.2d 1328, 1331 (9th Cir. 1986)).

14 Here, while the Court has found that Plaintiff’s Complaint has survived the sua sponte
15 screening process such that it requires a response from Defendants, the record is not developed
16 such that the Court can make a determination on the likelihood of success on the merits at this
17 stage of the proceedings. In addition, at this stage, Plaintiff appears to be able to articulate his
18 claims as set forth above in the Court’s determination that he is entitled to U.S. Marshal Service
19 of his Complaint. Accordingly, the Court denies Plaintiff’s request without prejudice, as neither
20 the interests of justice nor exceptional circumstances warrant appointment of counsel at this
21 time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

22 **V.**

23 **CONCLUSION AND ORDER**

24 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

25 1. Plaintiff’s Motion for Court Order for Legal Access to Law Library is **DENIED**
26 without prejudice [ECF No. 4].

27 2. Plaintiff’s Motion to Appoint Counsel [ECF No. 5] is **DENIED** without prejudice.

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3. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is
GRANTED.

4. The Secretary of California Department of Corrections and Rehabilitation, or his
 designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing
 fee owed in this case by collecting monthly payments from the trust account in an amount equal
 to twenty percent (20%) of the preceding month's income credited to the account and forward
 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

5. The Clerk of the Court is directed to serve a copy of this order on Matthew Cate,
 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
 Sacramento, California 94283-0001.

IT IS FURTHER ORDERED that:

6. The Clerk shall issue a summons as to Plaintiff's Complaint [ECF No. 1] upon
 Defendants and shall and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for
 each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order
 and a certified copy of his Complaint and the summons so that he may serve Defendants. Upon
 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and
 accurately as possible, and to return them to the United States Marshal according to the
 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,
 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed
 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.
See 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

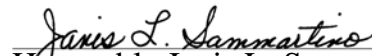
7. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the
 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See*
 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to
 reply to any action brought by a prisoner confined in any jail, prison, or other correctional
 facility under section 1983," once the Court has conducted its sua sponte screening pursuant to

1 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based
2 on
3 the face on the pleading alone that Plaintiff has a “reasonable opportunity to prevail on the
4 merits,” the defendant is required to respond).

5 8. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
6 counsel, upon Defendants’ counsel, a copy of every further pleading or other document
7 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
8 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
9 of any document was served on Defendants, or counsel for Defendants, and the date of service.
10 Any paper received by the Court which has not been filed with the Clerk or which fails to
11 include a Certificate of Service will be disregarded.

12 **IT IS SO ORDERED.**

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14 DATED: September 6, 2011

15 
16 Honorable Janis L. Sammartino
17 United States District Judge
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